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Paving way forward: Judicial pronouncements and evolution of privacy as a fundamental right and impact on data protection

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Abstract

Privacy is an essential value for the development of human personality. In earlier times man used to possess personal property i.e., his land and house. Therefore, the privacy was related to personal property of him. The threat to his privacy was from the government which has power of search and seizure and from private persons who trespass the property. However, with advancements in science and technology, people's lives have come under continual societal scrutiny. Particularly social media and online service platforms and Mobile Apps has also contributed to an individual's invasion of privacy. Individual personal information is given to society that was not meant to be disclosed. In general, a person wishes to have control over the dissemination of his personal information. People have become oblivious to the dangers of using services based on Artificial Intelligence. Today, A.I based sophisticated devices, particularly wearable gadgets, have crushed 'privacy' to its core, and personal information has become a 'commodity' as a result. It's now for sale. With the increased usage of information technology and computers, service providers acquire information on an individual. This personal information is being used unlawfully for commercial gain. As a result, an individual's privacy is jeopardised, infringed upon, and violated. This raised the legal eye and the right to privacy evolved as a fundamental right. This paper has focused on the evolution of right to privacy and various legislation to safeguard the same.

Keywords: Data protection laws, privacy legislation, digital privacy, legal framework for data protection

Introduction

In general terms, privacy means "a state in which no one else observes or disturbs" or, we might say, "a state of being free from public attention". This is not an "abstract concept". We can understand its meaning about the 'culture of a nation, 'political structure of a country, and a particular duration. At present, it has become a matter of great concern in democratic societies characterized by the highly "sophisticated-bureaucratic" system and improved techniques in 'communication' and 'information system'. Privacy is the result of a person who wants to hide from others some information about his 'past' and 'present' experiences and activities, and his expectations for what's to come. The desire for privacy communicates the craving to be a secret from other people and to control others' discernments and convictions about a proud person. Personal information is essential for disclosure that reveals oneself, changes one's existence for others, and promotes the growth of a desirable personality.

As it is and in the name of others, even more, compelling targets, privacy may be lost. But the cost to pay for the end achieved in terms of privacy and its relevance, without freedom, lost health, poor commitment to society and social stability can be enormous. Privacy is the capacity of a 'person' or 'group of persons' to separate data about them, and from there they choose themselves. If anything is private to an individual, it implies that something is characteristically uncommon or touchy to them.

Privacy is an interference-free "space to grow" that is experienced with the freedom of exploration to pursue experimental projects in the fields of science, art, work, play, and life. Privacy can likewise appear as "physical integrity. The right to be shielded from an unrestrained invasion of privacy by "governments," "organizations," or "individuals. It is a component of many nations' "privacy legislation" and the constitution in some. A person can

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give out personal information in the corporate world, including their advertising, in exchange for a benefit. The public interest may be governed by public interest laws. Information about an individual is voluntarily supplied but could subsequently be stolen or used improperly.

The "right to privacy" has been announced as the "right to be alone", "to be free from unwanted propaganda" & "to live a life without unwanted interference in public", which is not a public matter. The phrase "right to privacy" refers to a broad range of rights that are meant to be inherent in the idea of commanded freedom. This right protects an individual's freedom, his or her right to privacy, and his or her relationships with his or her family and other people from interference by the government. Privacy rules also forbid access to personal information such as "IT returns," "credit reports," etc. and excessive listening to private communications such as "Electronic surveillance". For example, they forbid taking pictures of people in public places. In a sense, having the freedom to live however one pleases is the "right to privacy".

Judicial pronouncement: Taking concept of privacy way forward: In *Govind v State of MP*, while holding that the right to privacy is an intrinsic part of the fundamental rights guaranteed by the constitution, the Supreme Court chose to restrict the meaning of privacy to the spaces and institutions within the society while completely omitting the scope of protection of the individuals. The formulations such as marriage, home and motherhood don't go beyond protecting the social relations and institutions and thus adhere to a restrictive understanding of the right to privacy. In what used to be understood as the privacy at home, the court in *Govind* justified the restricted understanding of the right to privacy with two theories in the backdrop.

The first theory that justifies the existence of privacy at the homes is that the acts taking place inside the four walls of the home that cause no offense to the others aren't constitutional protection able. The second theory which sounds very plausible rests on the proposition that an individual's needs a "sanctuary" that is free from social control and intervention where "individuals can drop the mask. Desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures". The phase witnessed a desperate attempt on the part of the Supreme Court to create a space for the right to privacy in the Indian constitutional scheme, but of course in an extremely restricted form. One of the most notable objections to the home based spatial and relational notion of the right to privacy is founded upon the argument that the right to privacy stems from the notion that these notions cast a blind eye upon the imbalance of status of relationship within the home.

At times, the right to privacy in home has also been regarded as based upon an understanding that seeks to preserve the male authority within the family. The observations in *Govind* outline the aspects of the right to privacy.

- The right to privacy is limited to the spatial boundaries and the activities that it governs are related to the things that are done within the four walls of the home.
- The right to privacy is aimed at preserving the social institutions such as marriage and the functions arising out of these institutions.

- Decisional autonomy of the individuals that is based on the premise that "An individual has the right to take their own decision."

It took a bold step from the HC of Andhra Pradesh, in a decision that was well ahead of its times to break away from the shackles of restrictive interpretation of the right to privacy. Justice Chaudhary in *T Sareetha* entirely premised the understanding of the right to privacy on the right to decisional autonomy and bodily integrity and thus rejected the argument that the site of claim of right to privacy are social institutions and functions arising thereof. The court held that, "any plausible definition of right to privacy is bound to take human body as its first and most basic reference for control over personal identity, the right to privacy belongs to a person as an individual and, is not lost by marital association." In what may be regarded as the very radical step, the Court further observed that, "a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and the mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of such a person.

Clashes between spatial, institutional and decisional privacy
The Clashes between the individualistic and institutional conception of right to privacy is most amply reflected by the Courts approach on issues concerning the "offences against marriages" and restitution of conjugal rights. In *T Sareetha V Venkatasubbaiah*, the Andhra Pradesh High Court, while giving predominance to the individual right to privacy over the institutional privacy, held the Section 9 of the Hindu Marriage Act 408 as unconstitutional on the account of "state interference" in the decision making of the women.

The view taken in *Sareetha* can be traced back to the proposition of Justice Brandie in *Olmstead vs New York* that sought to balance the power between the state and the individual in order to secure the right to privacy. The "Conventions of female chastity and modesty" have shielded women in a mantle of privacy at a high cost to sexual choice and self-expression. In a considerably male dominated society like India, the proposition would need no further elaboration and unfortunately, until recently the Supreme Court of India had been proving these apprehensions genuine in the guise of protecting the sanctimony of marriage. It was only in the case of *Joseph Shine*, that the Supreme Court was able to do away with a substantial chunk of credible criticism surrounding the ill effects of coerced privacy within the home. The SC in *Puttaswamy*, categorically held accepted the individual based notion of the right to privacy and all the six opinions retreated the view that the view that the individual autonomy lies at the core of right to privacy. The speculation regarding the effect of right to privacy on the women within the four walls was put to rest by Justice Chandrachud in his opinion, he observes, "Many writers on feminism express concern over the use of privacy as a veneer for patriarchal domination and abuse of women. Patriarchal notions still prevail in several societies including our own and are used as a shield to violate core constitutional rights of women based on gender and autonomy. Privacy must not be utilized as a cover to conceal and assert patriarchal mindsets.

Justice Chandrachud, it must be mentioned, was most firm

in tackling the genuine propositions raised by the feminist thinkers and placing the individual at the core of the right to privacy. With the individual as the basic unit of the constitution, the normative defenses to regressive practices such as marital rape are going to come under the scanner in near future.

Privacy judgement and the aftermath

The 2017 was one of the most remarkable years in the arena of transformative constitutionalism in India wherein the SC shed the shackles of a lot of regressive notions that it had voluntarily allowed to inhibit itself from adopting to the changing social and legal dynamics.

The observation of Justice Chandrachud in Puttaswamy was influential in shedding the non-individualistic notions attached to the concept of privacy in Indian constitutional scheme to a great extent. The first progressive manifestation of the broader interpretation of right to privacy is reflected in Joseph Shine v Union of India, wherein the Supreme Court held the regressive adultery law as unconstitutional, defying all the arguments that it had itself stuck to base on the premise of “saving the institution of marriage”. What now represents the current outlook of the supreme court on the concept of privacy is amply reflected in the cases of Joseph Shine v. Union of India and Navtej Singh Jauhar v. Union of India. As we have noted earlier, the understanding of the notion of right to privacy has undergone a sea of change over the years. After the landmark judgement in K S Puttaswamy, the commentators had rightly noted that the days of archaic Victorian provisions like section 497 and 377 of the Indian Penal Code were numbered and rightly so, following the law laid down in Puttaswamy, the Section 497 of the IPC was held to be Unconstitutional. The following excerpt from the judgement will be determinative of the path that will be charted by the Indian Data Protection regime for years to come.

“Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination”.

The Section 497 of the Indian Penal Code that criminalized adultery was based upon the notion of romantic paternalisation of women and sought to treat women as a chattel, owned by their husbands. Holding that the decisional privacy was an inherent aspect of the right to dignity, the Supreme Court marked the herald of the chapter

of decisional privacy in the Indian scheme. In Navtej Singh Jauhar v. Union of India, the Supreme Court once again following its ration in KS Puttaswamy decriminalized the hitherto offence of “homosexuality” on the grounds of unwarranted inference in the right to decisional privacy of the individuals. The court held that the scope of the right to privacy is quite broad under the Indian constitutional scheme and it encompasses within its fold the decisional, spatial and informational privacy as well. The right to privacy is inherently related to the to the autonomy in making personal choices related to food, sexual choices, religion etc. and the unwarranted interference of the state would tantamount to violation of the fundamental right to privacy of the individuals.

The Court then went on to observe that Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. The subsequent decriminalization of the old notions of the right to privacy which were invariably attached to the social relations have established the fact that the Supreme Court of India has laid the foundations of a robust privacy protection regime in India. However, does that foundation help in establishing a healthy data protection regime in India will depend a lot on the course adopted by the legislature?

Way forward to data protection and current scenario

It has to be ceded that the Indian society as whole including the constituent assembly was not open to the idea of accepting the right to privacy as a distinct right that could be attached to dignity and the right to life and liberty. Following the same line of thinking, the Constitutional Courts in India took over seven decades to recognize the existence of a distinct right to privacy within the Indian Constitution scheme. As far as data protection is concerned, the initial approach of the Indian legislature was to tackle the growing instances of the data theft and fraud in the booming Indian Information Technology sector. The fact that the driving force behind the enactment of the Information Technology Act, 2000 was the objective to curb the growing menace of cyber fraud and not the issue of data protection resulted into a very weak data protection law in India.

The existing data protection regime in India offers a very negligible guide upon the existence of policy of anonymised data. Neither the Information Technology Act, 2000 nor the SDPI Rules 2011 have any provisions mandating data anonymisation. On the other hand, the global jurisprudence on the principles of data anonymisation is abundant and extremely well developed.

In the absence of a comprehensive data protection law in India, one has to look for the provisions in various other legislations that are aimed at the providing adequate security to the personal data of the individuals. Some of the enactments that do seek to protect the informational privacy of the individuals do include the Information Technology Act, 2000 and yet to be enforced Digital Personal Data

Protection Act, 2023 the Information Technology Rules 2020, and the researcher has analysed the various provisions of these enactments to gauge the effectiveness of the existing data protection regime in India.

- Indian Data Protection adopts a very feeble approach towards data protection and is ill-equipped with provisions that can't afford protection to the personal data of the individuals.
- The globally accepted Data Protection Principles have not been adopted under the Indian Data Protection regime in India.
- With the State being the largest processor of data, the law should afford sufficient safeguards against the possibility of invasion to the right to data privacy by the state. The current data protection framework in India is inapplicable to the State-actors which renders it impossible to protect the unwarranted data breach by government and its agencies.
- The lack of adequate mechanisms to guarantee and enforce the data protection principles are absent in the laws at present and there is a dire need to propel a paradigm shift in the approach of the legislature to confer the ownership of data to the data principals.
- There is a need to have an independent Data protection Authority in India to enforce the rights of individuals against data breaches. Currently there is no provision mandating the establishment of a data protection authority and the whole adjudication framework of data breach claims are manned by the executive.
- The provisions of the existing data protection regime in India have negligible emphasis on the data security measures and hence there is a need to include the provisions regulating the social media intermediaries and data localization.
- The Information Technology Act, 2000 poses a great deal of barriers upon the enforcement of the right to be compensated on the grounds of data breach and thus makes it unfriendly to the rights of data principals.
- The existing data protection framework lacks the key principles of data protection such as the right to erasure, the right to informational self-determination, right to informed consent, the right to be forgotten etc.
- The existing regime doesn't offer any protection to the children's data and fails to include them within the meaning of personal data.
- The obligations of the data processors are extremely curtailed in their ambit and thus it becomes extremely difficult to secure the remedies that have been provided for in the existing laws.
- The entire framework lacks to incorporate the provisions to tackle the threat of breach of data by using the new technological advancements. The provisions relating to anonymization and privacy by design are completely absent.
- The Supreme Court of India has upped the ante against the existing lacunas in the Data Protection regime in the country and by holding that the right to informational self-determination was an inherent aspect of the fundamental right to privacy, the apex court has laid down the foundations of a robust data protection framework in the country.

Over one third of a decade has already passed since the day the Right to Privacy was recognized as a fundamental right guaranteed by the Constitution of India. However, we have seen a very little progress in the direction of enacting a comprehensive Data Protection Law in India and the Data Protection Act, 2023 is yet to see the light of the day.

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